

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

KEITH O'NEILL and :
SANDRA O'NEILL and NATIONWIDE :
INSURANCE CO. :
 : Civil No. 1:98CV244
v. :
 :
BLACK & DECKER (U.S.), INC. :
_____ :

CHARGE TO THE JURY

GENERAL INSTRUCTIONS

Province of the Court and Jury

In this case, Keith and Sandra O'Neill, and Nationwide Insurance Co., allege they suffered damages as a result of a defective toaster oven which was designed, manufactured and sold by Black & Decker. They allege three theories of liability, which I will explain to you shortly: strict products liability, breach of warranty, and negligence. In response, Black & Decker denies any liability for damages incurred by the O'Neills and Nationwide.

Now that you have heard the evidence and arguments, it becomes my duty to give you the instructions of the Court as to the law applicable to this case.

It is your duty as jurors to follow the law as I shall state it to you, and to apply that law to the facts as you find them from the evidence in the case. You are not to single out one instruction alone as stating the law, but you

must consider the instructions as a whole. Neither are you to be concerned with the wisdom of any rule of law stated by me.

Counsel have quite properly referred to some of the governing rules of law in their arguments. If, however, any difference appears to you between the law as stated by counsel and the law stated by the Court in these instructions, you are to be governed by the Court's instructions.

Nothing I say in these instructions is to be taken as an indication that I have any opinion about the facts of the case, or what that opinion is. It is not my function to determine the facts, but rather it is yours.

You must perform your duties as jurors without bias or prejudice as to any party. The law does not permit you to be governed by sympathy, prejudice or public opinion. All parties expect that you will carefully and impartially consider all of the evidence, follow the law as it is now being given to you, and reach a just verdict, regardless of the consequences.

All Persons Equal Before the Law

This case should be considered and decided by you as an action between persons of equal standing in the community, of equal worth, and holding the same or similar stations in life. All persons stand equal before the law and are to be dealt with as equals in a court of justice.

Likewise, corporations are entitled to the same fair trial at your hands as private individuals. All persons, including corporations, stand equal before the law and are to be dealt with as equals in a court of justice.

Evidence in the Case

Statements and arguments of counsel are not evidence in the case. However, when the attorneys on both sides stipulate or agree as to the existence of a fact, the jury must, unless otherwise instructed, accept the stipulation and regard that fact as proved.

Unless you are otherwise instructed, the evidence in the case always consists of the sworn testimony of the witnesses, regardless of who may have called them; all exhibits received in evidence, regardless of who may have produced them; and, all facts which may have been admitted or stipulated.

Any evidence to which an objection was sustained by the Court, and any evidence ordered stricken by the Court, must be entirely disregarded.

If a lawyer has asked a witness a question which contains an assertion of fact, you may not consider the lawyer's assertion as evidence of that fact. The lawyer's statements are not evidence.

Evidence--Direct, Indirect, or Circumstantial

There are, generally speaking, two types of evidence from which a jury may properly find the truth as to the facts of a case. One is direct evidence--such as the testimony of an eyewitness. The other is indirect or circumstantial evidence --the proof of a chain of circumstances pointing to the existence or non-existence of certain facts.

As a general rule, the law makes no distinction between direct or circumstantial evidence, but simply requires that the jury find the facts in accordance with the preponderance of all the evidence in the case, both direct and circumstantial.

Inferences Defined

You are to consider only the evidence in this case. But in your consideration of the evidence you are not limited to the bald statements of witnesses. In other words, you are not limited to what you see and hear as the witnesses testify. You are permitted to draw, from facts which you find have been proved, such reasonable inferences as seem justified in the light of your experience.

Inferences are deductions or conclusions which reason and common sense suggest are probably true, based on the facts which have been established by the evidence in the case.

Opinion Evidence -- Expert Witness

The rules of evidence ordinarily do not permit witnesses to testify as to opinions or conclusions. An exception to this rule exists as to those whom we call "expert witnesses." Witnesses who, by education and experience, have become expert in some art, science, profession, or calling, may state their opinions as to relevant and material matters in which they profess to be expert, and may also state their reasons for the opinion.

You should consider each expert opinion received in evidence in this case, and give it such weight as you may think it deserves. As with ordinary witnesses, you should determine each expert's credibility from his or her demeanor, candor, and bias, and possible interest in the outcome of the trial. If you should decide that the opinion of an expert witness is not based upon sufficient education and experience, or if you should conclude that the reasons given in support of the opinion are not sound, or if you feel that it is outweighed by other evidence, you may disregard the opinion entirely.

Credibility of Witnesses -- Discrepancies in Testimony

You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves. You may be guided by the appearance and conduct of the witness, or by the manner in which the witness testifies, or by the character of the testimony given, or by evidence to the contrary of the testimony given.

You should carefully scrutinize all the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to show whether a witness is worthy of belief. Consider each witness' intelligence, motive and state of mind, and demeanor or manner while on the stand. Consider the witness' ability to observe the matters as to which the witness has testified, and whether the witness impresses you as having an accurate recollection of these matters. Consider also any relation each witness may bear to either side of the case, any bias or prejudice, the manner in which each witness might be affected by the verdict, and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not give you cause to discredit such testimony. Two or more persons witnessing an incident or a transaction may see

or hear it differently, and innocent misrecollection, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

After making your own judgment, you will give the testimony of each witness such weight, if any, as you may think it deserves.

You may, in short, accept or reject the testimony of any witness in whole or in part.

Also, the weight of the evidence is not necessarily determined by the number of witnesses testifying to the existence or non-existence of any fact. You may find that the testimony of a small number of witnesses as to any fact is more credible than the testimony of a larger number of witnesses to the contrary.

Credibility of Witnesses -- Inconsistent Statements

The testimony of a witness may be discredited, or as we sometimes say, "impeached," by showing that he or she previously made statements which are different than or inconsistent with his or her testimony here in court. The earlier inconsistent or contradictory statements are admissible only to discredit or impeach the credibility of the witness and not to establish the truth of these earlier statements made somewhere other than here during this trial, unless the witness had adopted, admitted or ratified the prior statements during the witness' testimony in this trial. It is the province of the jury to determine the credibility, if any, to be given the testimony of a witness who has made prior inconsistent or contradictory statements.

If a person is shown to have knowingly testified falsely concerning any important or material matter, you obviously have a right to distrust the testimony of such an individual concerning other matters. You may reject all of the testimony of that witness or give it such weight or credibility as you think it deserves.

An act or omission is "knowingly" done if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

Verdict -- Unanimous -- Duty to Deliberate

The verdict must represent the considered judgment of each juror. To return a verdict, it is necessary that each juror agree. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another, and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. You must each decide the case for yourself, but only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views, and change your opinion, if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of other jurors, or for the mere purpose of returning a verdict.

Remember at all times that you are not partisans. You are judges -- judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

INSTRUCTIONS OF LAW

It is now my duty to give you instructions concerning the law that applies to this case. It is your duty as jurors to follow the law as stated in these instructions. You must then apply these rules of law to the facts you find from the evidence.

It is the sole province of the jury to determine the facts in this case. By these instructions, I do not intend to indicate in any way how you should decide any question of fact.

Burden of Proof and Preponderance of the Evidence

The burden is on the plaintiff in a civil action, such as this, to prove every essential element of his or her claim by a preponderance of the evidence. If the proof should fail to establish any essential element of the plaintiff's claim by a preponderance of the evidence in this case, the jury should find for the defendant as to that claim.

To "establish by a preponderance of the evidence" means to prove that something is more likely so than not so. In other words, a preponderance of the evidence in the case means such evidence as, when considered and compared with that opposed to it, has more convincing force, and produces in your minds belief that what is sought to be proved is more likely true than not true. This rule does not, of course, require proof to an absolute certainty, since proof to an absolute certainty is seldom possible in any case.

Stated another way, to establish a fact by a preponderance of the evidence means to prove that the fact is more likely true than not true. A preponderance of the evidence means the greater weight of the evidence. It refers to the quality and persuasiveness of the evidence, not to the number of witnesses or documents. In determining whether a fact, claim ~~or defense~~ has been proven by a preponderance of the evidence, you may consider the relevant

testimony of all witnesses, regardless of who may have called them, and all the relevant exhibits received in evidence, regardless of who may have produced them.

Respondeat Superior

The defendant in this case is a corporation. A corporation can only act through its officers, employees and agents, and is liable for the acts and omissions of an employee who is acting within the scope of his or her employment. For the purposes of your deliberations, you should consider the act or omission of any employee of the corporation to be the act or omission of the corporation itself.

Strict Products Liability

The first theory alleged by the plaintiffs is called "strict liability." Keith and Sandra O'Neill, and Nationwide, claim Black & Decker is strictly liable for their damages because it manufactured and sold a toaster oven that was defective or unreasonably dangerous, either by design or manufacture.

To prevail on this claim, the plaintiffs must first establish that Black & Decker manufactured and sold a toaster oven which, at the time of its manufacture and sale, was in a defective condition unreasonably dangerous to its user, the plaintiffs. A product is in a "defective condition unreasonably dangerous to its user" if it is unreasonably dangerous to the user and may cause physical harm beyond that expected by the ordinary user who has ordinary knowledge of its characteristics in connection with its ordinary use. It is not necessary for you to find the defendant knew or should have known of the product's potential for causing injury or damage.

Second, the plaintiffs must show that the toaster oven was expected to and did reach the user without a substantial change in its condition.

Third, the plaintiffs must show that the defective condition; if any, was a substantial factor in causing the

plaintiffs' damages.

You should keep in mind that the law does not create absolute liability on Black & Decker as the manufacturer and/or seller of the toaster oven. The mere fact that an accident has occurred does not automatically mean that the defendant is liable. However, the defendant was required to deliver a product which was free from defective and unreasonably dangerous conditions.

Breach of Warranty

The second theory by which the plaintiffs seek to hold the defendant liable is called "breach of the implied warranty of merchantability." The implied warranty of merchantability is one imposed by law on sellers of goods, meaning that when goods are sold, they must be of merchantable quality—that is, of fair quality and reasonably safe for the normal use for which the product is made and sold. In other words, goods when sold must be fit for the ordinary purposes for which the goods are used to be considered "merchantable." The ultimate user of the product must use ordinary care, but is not obligated to observe latent defects.

The warranty is intended to protect the immediate buyer and also any ultimate user of the goods who is likely to be injured by the use of an unfit product. In this case, the O'Neills are the ultimate user of the toaster oven which was manufactured and sold by Black & Decker.

If you find Black & Decker did not breach its implied warranty of merchantability, that is, if you find the toaster oven at issue was reasonably fit for the ordinary purpose for which it was intended, then you must find for the defendant on this claim. However, if you find the defendant breached its warranty of merchantability, then you must consider whether that breach was a legal or proximate cause of the O'Neills'

and Nationwide's resulting damages. I will explain the term "proximate cause" to you momentarily.

Negligence

As a third theory upon which to hold the defendant liable, the O'Neills and Nationwide allege Black & Decker's negligence caused their damages. The plaintiffs allege the defendant negligently designed and manufactured the toaster oven.

To prevail on this claim, the plaintiffs must prove: (1) The defendant was negligent; and (2) the defendant's negligence was ^Aproximate cause of their damages.

"Negligence" is the breach of a legal duty to exercise ordinary or due care which a prudent person would exercise under the same or similar circumstances. Negligence may consist of omitting to do something a reasonably prudent person would do or doing something which a reasonably prudent person would not do under the same or similar circumstances.

In general, a "duty" in negligence cases may be defined as an obligation to conform to a particular standard of conduct toward another. Here, the defendant has a duty to design and manufacture a toaster oven which is reasonably safe for its intended purpose and is free from hidden defects which may foreseeably cause harm to its users.

If you find Black & Decker breached its duty, you must also consider whether that breach was a proximate cause of the plaintiffs' damages. Damage is proximately caused by an act,

or a failure to act, whenever it appears from the evidence in the case that the act or omission played a substantial part in bringing about or actually causing the damage, and that damage was either a direct result or a reasonably probable consequence of the act or omission.

The plaintiffs need not show that the defendant's negligence was the only proximate cause of their damages. The law recognizes that there may be more than one proximate cause of an injury or damage. Many factors or things, or the conduct of two or more persons, may operate either independently or together, to cause injury or damage; and in such a case, each may be a proximate cause. If you find that the defendant's negligence, if any, was not a proximate cause of the plaintiffs' damages, then you should return a verdict in favor of the defendant on this claim.

Effect of Instruction as to Damages

The fact that I will instruct you as to the proper measure of damages should not be considered as intimating any view of mine as to which party is entitled to your verdict in this case. Instructions as to the measure of damages are given for your guidance, in the event you should find in favor of the plaintiffs from a preponderance of the evidence in the case in accordance with the other instructions.

Damages

If you should find in favor of the plaintiffs and against the defendant on one or more of plaintiffs' claims of strict liability, negligence, or breach of warranty, then you must consider the issue of damages. The plaintiffs must prove, by a preponderance of the evidence, the amount of damages to which they are entitled. You may include only the damages the plaintiff has proven by a preponderance of the evidence. You may not award speculative damages or damages based on sympathy.

The plaintiffs here seek compensation for real and personal property damages and losses. In cases involving damages to real property, such as to the O'Neills' house, the plaintiffs are entitled to recover the costs of reconstruction or repairs necessary to restore their property to the condition in which it existed immediately prior to the event that caused the damages.

For personal property, the measure of recovery is the cost of repair of the item or, in the event of replacement, the difference between the fair market value of the replaced item immediately before the damage and the fair market value immediately thereafter. "Fair market value" can be defined as the amount a willing seller would accept from a ready, willing and able buyer to purchase the property on the day in

question.

Note that the plaintiffs have only one action to recover for their damages. Whatever they are entitled to recover in the future on account of their damages must be included in the amount they recover now.

Election of a Foreperson

I will select _____ to act as your foreperson. The foreperson will preside over your deliberations and will be your spokesperson here in court.

A form of special verdict has been prepared for your convenience. You will take this form to the jury room. I direct your attention to the form of the special verdict.

[Form of special verdict is read.]

The answer to each question must be the unanimous answer of the jury. Your foreperson will write the unanimous answer of the jury in the space provided for each question and will date and sign the special verdict, when completed.

Verdict Form -- Jury's Responsibility

It is proper to add the caution that nothing said in these instructions and nothing in any form of verdict prepared for your convenience is meant to suggest or convey in any way or manner any intimation as to what verdict I think you should find. What the verdict shall be is your sole and exclusive duty and responsibility.

Conclusion

To return a verdict, all jurors must agree to the verdict. In other words, your verdict must be unanimous.

Upon retiring to the jury room your foreperson will preside over your deliberations and be your spokesperson here in court.

When you have reached a unanimous verdict, your foreperson should sign and date the verdict form.

If, during your deliberations, you should desire to communicate with the Court, please reduce your message or question to writing, signed by the foreperson, and pass the note to the court security officer. He will then bring the message to my attention. I will respond as promptly as possible, either in writing or by having you return to the courtroom so that I may address your question orally. I caution you, with regard to any message or question you might send, that you should never specify where you are in your deliberations or your numerical division, if any, at the time.